

FILED
04-23-2024
Circuit Court
Portage County
2024CV000115

STATE OF WISCONSIN: CIRCUIT COURT: PORTAGE COUNTY
BRANCH

LISA ANDERSON
9523 County Road SS
Nelsonville, WI, 54458;

GARY ANDERSON
2820 County Road Q
Nelsonville, WI 54458;

KATY BAILEY
411 6th Street S
Wisconsin Rapids, WI 54494;

STACY O'CARROLL
3111 Oak Street
Nelsonville, WI 54458; and

MARIANNE WALKER
9699 County Road SS
Amherst Junction, 54407

Petitioners,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES
101 South Webster Street
Madison, Wisconsin 53707;

STEVEN LITTLE, in his official capacities as
acting SECRETARY and DEPUTY SECRETARY
of the Wisconsin Department of Natural Resources
101 South Webster Street
Madison, Wisconsin 53707; and

GORDONDALE FARMS, INC.
2823 County Road Q
Nelsonville, WI 54458.

Respondents.

Case No.2024-CV-

Case Codes:

30607 (Admin. Agency Review)

30701 (Declaratory Judgment)

SUMMONS

THE STATE OF WISCONSIN, To each person named above as a Respondent:

You are hereby notified that the Petitioners named above have filed a lawsuit or other legal action against you. The Petition, which is attached, states the nature and basis of the legal action.

Within forty-five (45) days of receiving this Summons, you must respond with a written answer, as that term is used in Wis. Stat. ch. 802., to the Petition. The Court may reject or disregard an answer that does not follow the requirements of the Statutes. The answer must be sent or delivered to the Court, whose address is Portage County Courthouse, 1516 Church Street, Stevens Point, Wisconsin 54481 and to Petitioners' attorneys, Adam Voskuil and Daniel Gustafson, Midwest Environmental Advocates, whose address is 634 West Main Street, Suite 201, Madison, Wisconsin 53703. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the Court may grant judgment against you for the award of money or other legal action requested in the Petition, and you may lose your right to object to anything that is or may be incorrect in the Petition. A judgement may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Respectfully submitted this 23rd day of April, 2024.



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PETITION FOR JUDICIAL REVIEW AND DECLARATORY JUDGMENT

The Petitioners, Lisa Anderson, Gary Anderson, Katy Bailey, Stacy O’Carroll, and Marianne Walker, by their attorneys Midwest Environmental Advocates, petition this Court pursuant to Wis. Stat. § 227.52, *et seq.*, for review of a settlement agreement between the Department of Natural Resources (DNR) and a regulated concentrated animal feeding operation (CAFO), Gordondale Farms, Inc. (“Gordondale”), that prevents DNR from fulfilling its statutory obligation to consider public input in state permitting decisions (hereinafter “DNR/CAFO Agreement”). The DNR/CAFO Agreement weakened groundwater monitoring terms in Gordondale’s Wisconsin Pollutant Discharge Elimination System (“WPDES”) permit. Petitioners are Portage County residents and neighbors to the CAFO who rely on groundwater for potable uses and whose comments opposing the weakened terms could not be considered by DNR because of the DNR/CAFO Agreement.

In addition, Petitioners seek a declaratory judgment, pursuant to Wis. Stat. § 806.04, that:

- (a) Wis. Stat. § 227.43(2)(a) and Wis. Admin. Code § NR 2.055 do not grant DNR the discretion to choose not to transmit a verified petition for a contested case hearing that meets jurisdictional requirements to the division of hearings and appeals; and
- (b) DNR is required to transmit Gordondale’s September 2022 Contested Case Hearing Petition to the division of hearings and appeals.

PARTIES

1. Petitioner Lisa Anderson resides at 9523 County Road SS, Nelsonville, Portage County, Wisconsin. Ms. Anderson lives near Gordondale’s production area and spreading fields.

Ms. Anderson and her family rely on groundwater in the region for drinking water and other potable water uses, drawing water from a private well on their property. In 2004, the family's private well tested at 9.85 mg/L for nitrates, just below the safe drinking water standard of 10 mg/L; in 2011, Ms. Anderson replaced her well. Though nitrate tests initially showed decreased levels after the well installation, nitrate levels have gradually increased in the years since. Of note, nitrate contamination is linked to significant health impacts in vulnerable populations, including birth defects, blue-baby syndrome, colon cancer, and thyroid issues. Ms. Anderson is adversely affected by the DNR/CAFO Agreement which established weakened groundwater monitoring terms outside of the required public input process. Ms. Anderson is concerned that these pre-set terms will limit DNR oversight and allow for continued and increasing nitrate contamination of groundwater in Nelsonville, and at her home specifically. Ms. Anderson's interests are also impaired by this decision because she challenged Gordondale's 2020 WPDES permit modification and settled with DNR and Gordondale. That earlier settlement led to more favorable groundwater monitoring terms which were weakened by the DNR/CAFO Agreement.

2. Petitioner Gary Anderson resides at 2820 County Road Q, Nelsonville, Portage County, Wisconsin. Mr. Anderson's home is across the road from the "Home Farm," one of the three farms that collectively make up the Gordondale CAFO. Numerous Gordondale landspreading fields are nearby and upgradient of Mr. Anderson's home as well. Mr. Anderson built his current residence in 1999, and for about 15 years, nitrate levels were below the safe drinking water standard of 10 mg/L. In 2014, Mr. Anderson's nitrate levels reached 15.8 mg/L; the Gordon family paid to install a new well in 2015 in response. Following installation of the new well, Mr. Anderson's nitrate levels were 0.03 mg/L, but they have steadily risen over the last nine years. In 2018, Mr. Anderson's well nitrate level tested at 4.5 mg/L, and in 2023, Mr.

Anderon's well tested at 6.3 mg/L. He continues to test regularly, in hopes of tracking nitrate level fluctuations, but instead, he has seen nitrate only increase. Mr. Anderson is worried that if Gordondale's spreading practices continue, his nitrate levels will continue to rise, and may eventually exceed safe drinking water standards again. As such, the weakening of groundwater monitoring terms outside of the appropriate public participation processes impairs his interests in clean and safe water. Additionally, Mr. Anderson has commented on Gordondale WPDES permits in the past, and has advocated for groundwater monitoring to both DNR and local governments. His interests are impaired by the DNR/CAFO Agreement because the decision to settle and establish terms outside of the required public input process deprived him of his right to participate in the WPDES permitting process and have his comments considered by DNR.

3. Petitioner Katy Bailey resides at 411 6th Street S, Wisconsin Rapids, Wood County, Wisconsin. Before moving to Wisconsin Rapids, Ms. Bailey lived at 3151 Oak Street, Nelsonville, Portage County, Wisconsin for ten years, which was near Gordondale Farms' production site and within a half-mile of the Gordondale "Home Farm" and numerous landspreading fields. Ms. Bailey first became aware of concerning nitrate levels at her former home in 2018 and attempted to install treatment systems soon after. Subsequent nitrate tests showed concerning levels. Due to past pregnancy complications and thyroid issues, the Bailey family stopped using their private well in 2019 for drinking water. In 2023, the Bailey family sold their home and moved to Wisconsin Rapids, citing ongoing health concerns caused by groundwater contamination. Ms. Bailey has remained engaged on these issues, commenting on permit modifications and tracking DNR decision-making. Ms. Bailey's interests are also impaired by this decision because she challenged Gordondale's 2020 WPDES permit

modification and settled with DNR and Gordondale. That earlier settlement led to more favorable groundwater monitoring terms which were weakened by the DNR/CAFO Agreement.

4. Petitioner Stacy O'Carroll resides at 3111 Oak Street, Nelsonville, Portage County, Wisconsin. Ms. O'Carroll's home is near Gordondale Farms' production site and within a half-mile of the Gordondale "Home Farm" and numerous landspreading fields. The O'Carroll's purchased the property in 2013, and at that time, private well tests showed nitrate levels of 7 mg/L. A few years later, Ms. O'Carroll had her private well water tested again, and the results for nitrates were 12 mg/L, which exceeds the safe drinking water standard. Around this same time, the Portage County Planning and Zoning Department began a water quality testing program and the O'Carrolls went around their neighborhood and collected water samples for testing. Of the 18 samples that the O'Carrolls collected, nine of them were above safe drinking water standard of 10 mg/L. Over the past few years, Ms. O'Carroll's well nitrate levels have fluctuated significantly but rarely test below 10 mg/L and have tested above 20 mg/L multiple times. Due to these fluctuations, Ms. O'Carroll does not feel secure drinking water from her private well. Ms. O'Carroll has participated in Gordondale permitting processes since her well tested above safe levels for nitrates. She has submitted comments to DNR and petitioned for hearings in the past. Most recently, Ms. O'Carroll testified at the December 7, 2023, public informational hearing on Gordondale's permit. Ms. O'Carroll's interests are impaired because her well is above the safe drinking water standard for nitrates and the DNR/CAFO Agreement established terms that are unlikely to address that contamination. Further, Ms. O'Carroll's interests are impaired because she has participated in the permitting process for years and DNR's decision to settle and establish permit terms outside of the required public input process deprived her of her right to effectively participate in the WPDES permitting process.

5. Petitioner Marianne Walker resides at 9699 County Road SS, Nelsonville, Portage County, Wisconsin, which abuts on one of Gordondale's landspreading fields. Ms. Walker has been monitoring her private well's nitrate levels since purchasing the property and has noted a significant increase since Gordondale began spreading on nearby fields. When the Walkers moved to their current residence, nitrate levels in their private well were just above 10 mg/L, Wisconsin's enforcement standard for nitrates. More recently, tests returned levels over 26 mg/L. In the summer of 2023, Ms. Walker permitted a Portage County groundwater monitoring well to be installed on her property. Recent testing at the Portage County well showed nitrate contamination above the state enforcement standard at all seven depths tested down to bedrock, with the highest nitrate level returning 49 mg/L. In addition to loss of property value, Ms. Walker has contracted for thousands of dollars on clean and safe drinking water for her home and is impaired by DNR's decision because the settlement terms are unlikely to lead to meaningful and representative data that could reduce nitrate contamination on her property. Moreover, Ms. Walker's interests are impaired by DNR's decision to settle because she was one of the individuals who challenged Gordondale's 2020 WPDES permit issuance and settled with DNR and Gordondale, which ultimately led to more favorable groundwater monitoring terms that were modified by the DNR/CAFO Agreement.

6. All Petitioners attended the December 7, 2023, public informational hearing on the proposed 2023 modification to the Gordondale WPDES permit that flowed from the DNR/CAFO Agreement. All Petitioners submitted comments to DNR on the proposed modification. Because of the nature of the settlement, Petitioner's interests were impaired because DNR could not consider their comments or change the monitoring terms before issuing a final permit.

7. Respondent DNR is an agency of the State of Wisconsin, as that term is defined by Wis. Stat. § 227.01(1) and as that term is used throughout Chapter 227 of Wisconsin Statutes. DNR's principal office is located at 101 South Webster Street, Madison, Dane County, Wisconsin. DNR is responsible for the administration of Chapter 283 of Wisconsin Statutes, including those provisions relating to the drafting and issuance of permits for the discharge of pollutants to waters of the state from CAFOs.

8. Respondent Steven Little is the Deputy Secretary and acting Secretary of DNR and is named in his official capacity only. Respondent Little maintains his principal office at 101 South Webster Street, Madison, Dane County, Wisconsin.

9. Respondent Gordondale Farms, Inc. is a Wisconsin corporation with its principal office located at 2823 County Road Q, Nelsonville, WI 54458. Gordondale is a large CAFO that operates in Portage County. Gordondale has participated in settlement negotiations with DNR focused on the terms of Gordondale's WPDES permit and has a pending contested case hearing petition that has been granted by DNR but not transmitted to the division of hearings and appeals.

JURISDICTION AND VENUE

10. The Court has jurisdiction over this action under Wis. Stat. §§ 227.52 and 806.04.

11. DNR's September 11, 2023, settlement agreement is a final agency decision reviewable by this Court pursuant to Wis. Stat. § 227.52.

12. Venue is proper in this Court pursuant to Wis. Stat. § 227.53.(1)(a)3 because four Petitioners reside in Portage County and the dispute arose from and relates to a permit issued to a CAFO operating in Portage County.

13. Petitioners timely file this Petition for Judicial Review and Declaratory Judgment.

BACKGROUND

I. THE CLEAN WATER ACT AND THE WPDES PROGRAM

14. The Clean Water Act provides a comprehensive approach for the regulation of pollution discharges to waters of the United States. In part, the Clean Water Act prohibits the discharge of pollutants to waters of the United States without a National Pollutant Discharge Elimination System (“NPDES”) permit. The United States Environmental Protection Agency (“USEPA”) has primary authority to administer the NPDES permitting program but may delegate that authority to a state if USEPA determines that the state can administer the program consistent with the Clean Water Act and its implementing regulations. 33 U.S.C. § 1342(b).

15. At the federal level 40 CFR § 25.3, Public Participation in Programs Under the Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the Clean Water Act, policy and objectives, outlines policy standards regarding public participation on NPDES permits under the Clean Water Act.

16. 40 CFR § 25.3(b) states:

Public participation is that part of the decision-making process through which responsible officials become aware of public attitudes by providing ample opportunity for interested and affected parties to communicate their views. Public participation includes providing access to the decision-making process, seeking input from and conducting dialogue with the public, assimilating public viewpoints and preferences, and demonstrating that those viewpoints and preferences have been considered by the decision-making official...

(emphasis added.)

17. The USEPA authorized the State of Wisconsin, via DNR, to administer the NPDES permit program in 1974.

18. The Wisconsin Legislature charged DNR with implementing the water pollution discharge permitting program in Chapter 283 of the Wisconsin Statutes. The Legislature also

delegated to DNR the authority to promulgate regulations consistent with the statutory framework. These water pollution statutes and regulations make up the WPDES program.

19. DNR issues water pollution discharge permits consistent with the WPDES program statutes and regulations.

II. WPDES PERMITTING PUBLIC PARTICIPATION REQUIREMENTS

20. Chapter 283 of the Wisconsin Statutes establishes public participation requirements that DNR must fulfill during the WPDES permitting process.

21. Wis. Stat. § 283.39 covers public notice and written comment requirements for WPDES permits and requires DNR to promulgate rules to fulfill those requirements.

22. Wis. Stat. § 283.39(2) requires DNR to provide a period of not less than 30 days following the date of public notice of the draft permit during which time interested persons may submit comments on the terms of draft WPDES permits.

23. Wis. Stat. § 283.39(2) requires that “all written comments during the comment period shall be retained by the department and considered in the formulation of the final determinations for the permit application.” (Emphasis added.)

24. In addition to written comment periods, DNR may also hold public hearings where interested members of the public can provide oral comments on draft WPDES permits. *See* Wis. Stat. § 283.49.

25. Wis. Stat. § 283.49(1) requires DNR to hold a public hearing on draft WPDES permits when requested by certain interested parties, including when requested by five or more persons.

26. DNR is required to promulgate, by rule, procedures for the conduct of public hearings. Wis. Stat. § 283.49(1)(c).

27. Public notice and comment requirements also apply to WPDES permit modifications. *See* Wis. Stat. § 283.53(2) & Wis. Admin. Code § NR 203.135(5)(a).

28. Wis. Admin. Code ch. NR 203 contains DNR's WPDES permit public participation procedures.

29. Pursuant to Wis. Admin. Code § 203.135(5)(a), DNR "shall follow the public notice, comment and hearing procedures in ch. NR 203" for WPDES permit modifications.

30. Wis. Admin. Code § NR 203.04 explains: "[a] public informational hearing...give[s] all interested persons an additional opportunity to make a statement with respect to a proposed permit or permit application and to have such statements considered in the final determination." (Emphasis added.)

31. Wis. Admin. Code § NR 203.08 explains that "any interested members of the public . . . may participate in a public informational hearing with respect to the issuance of the proposed permit."

32. Following the public comment period, Wis. Admin. Code § NR 203.12 explains that when issuing a final determination on a discharge permit, DNR may modify any terms and conditions of a draft permit based on "statements by the public or . . . any other pertinent information."

33. Therefore, any and all interested members of the public have a right to meaningful WPDES permit public comment periods, where their statements and comments can be given to DNR, weighed and considered by DNR, and have an opportunity to impact the final determination by DNR.

III. CONTESTED CASE HEARING PETITION TRANSMISSION DUTIES

34. “Any permit applicant, permittee, affected state or 5 or more persons may seek review of a WPDES permit denial, modification, termination, or revocation and reissuance, the reasonableness of or necessity for any term or condition of any issued, reissued or modified permit...” Wis. Stat. § 283.63(1). Such review is called a contested case hearing.

35. To initiate a contested case hearing, a verified petition must be filed with the DNR secretary within 60 days of the notice of the reviewable action.

36. CAFO WPDES permit contested case hearings are overseen by hearing examiners who are assigned by the administrator of the division of hearings and appeals in the Department of Administration. *See* Wis. Stat. § 227.43; Wis. Admin. Code § NR 2.07.

37. After receiving a petition for a contested case hearing, DNR determines whether the petition meets the jurisdictional requirements of the statutes and rules under which the petition is filed. Wis. Admin. Code § NR 2.055. If the petition meets jurisdictional requirements, DNR “shall transmit to the division of hearings and appeals under s. 227.43, Stats., only petitions or portions thereof which the department determines meet the applicable jurisdictional requirements.” *Id.* (emphasis added).

38. There is not a statutory or regulatory deadline governing when DNR must transmit contested case hearing petitions to the division of hearings and appeals.

39. However, DNR has a nondiscretionary duty to notify the division of hearings and appeals of every pending hearing to which the administrator of the division is required to assign a hearing examiner. *See* Wis. Stat. § 227.43(2)(a).

40. Once the petition is transmitted, the division of hearings and appeals, acting on behalf of DNR, must hold a public hearing where “all interested persons or their representatives

shall be afforded the opportunity to present facts, view or arguments relevant to the issues raised by petitioners.” Wis. Stat. § 283.63(1)(b).

41. Interested members of the public may also become parties to a contested case hearing. *See* Wis. Admin. Code § NR 2.08(2) & (5).

42. The contested case hearing process does not envision a liminal time between filing a petition and DNR initiating a contested case hearing where the department holds private settlement negotiations.

IV. GORDONDALE WPDES PERMITTING BACKGROUND

43. Gordondale Farms is a large CAFO for dairy cows that has been issued previous WPDES permits in Portage County, Wisconsin. Gordondale operates three facilities: Deere Ridge Dairy in Amherst, Wisconsin; the Home Farm in Nelsonville, Wisconsin; and the Hog Farm in Amherst Junction, Wisconsin. The three facilities exist within 1.5 miles of each other along Highway 161 surrounding the Village of Nelsonville, Wisconsin.

44. Gordondale applied for a WPDES permit reissuance, No. WI-0062359-03-0) (hereinafter the “Original Permit”) in 2017 with the intent to expand from 2,160 animal units to 2,505 animal units.

45. According to a DNR Fact Sheet produced for the Original Permit, the 2,160 animals produce approximately 12.5 million gallons of liquid manure and process wastewater and approximately 4,000 tons of solid manure per year which is spread on approximately 5,000 acres. **A true and correct copy of the Original Permit Fact Sheet is attached as Exhibit A.**

46. There was significant public participation on the proposed permit reissuance; DNR held a public informational hearing on July 19, 2018, and received a number of public comments.

47. DNR issued the Original Permit to Gordondale on July 31, 2020. **A true and correct copy of the Notice of Final Determination for the Original Permit is attached as Exhibit B.**

48. Five Village of Nelsonville residents (hereinafter “Original Petitioners”), including three current petitioners (Lisa Anderson, Marianne Walker, and Katy Bailey), and Clean Wisconsin petitioned for review of the Original Permit, and DNR granted a contested case hearing to address whether the Original Permit was unreasonable because, *inter alia*, it lacked groundwater monitoring at landspreading fields and thus failed to ensure compliance with groundwater quality standards.

49. The Original Petitioners, Clean Wisconsin, DNR, and Gordondale entered into a settlement dated May 14, 2021, to resolve the contested case (hereinafter the “Initial Settlement Agreement”). In the Initial Settlement Agreement, the parties agreed to resolve the contested case pending a ruling by the Wisconsin Supreme Court in *Clean Wisconsin v. DNR*, Case No. 2016-AP-1688 (the “Kinnard Case”) on the authority of the DNR to include certain terms in CAFO WPDES permits. **A true and correct copy of the Initial Settlement Agreement is attached as Exhibit C.**

50. The Initial Settlement Agreement contained the following provisions:

3. If the Court decides in the Kinnard Case that DNR is not precluded by law from including in a CAFO WPDES permit terms requiring groundwater monitoring at or near landspreading sites, then DNR shall determine whether it is appropriate and practicable to require monitoring at or near Gordondale Farms’ proposed landspreading sites. In determining the appropriateness and practicability of groundwater monitoring at or near landspreading sites DNR will consider, unless precluded by the Court: (i) the site-specific conditions at the proposed Gordondale Farms landspreading locations regarding soil make up, nutrient uptake, groundwater quality, and potential for groundwater contamination; (ii) the extent of Gordondale Farms land ownership or control in relation to potential receptors; (iii) any input provided by Gordondale Farms or Petitioners; and (iv) any other factors DNR is authorized to consider by statute, rule or the Court’s decision in the Kinnard Case. If DNR determines groundwater monitoring is appropriate and practicable at or near one or more landspreading sites, DNR will modify the Permit to include terms necessary to require such groundwater monitoring. Nothing herein

waives or affects any party's right to challenge or seek administrative review of such modification of the Permit, all such rights being fully reserved.

...

6. DNR shall not modify the Permit other than to implement Sections 2-5 of this Agreement, as may be allowed by this Agreement. Although DNR retains the authority to modify the Permit or any reissuance thereof for cause as provided in §§ NR 203.135(1) & 203.136 Wis. Admin. Code, DNR does not intend to modify the Permit other than as provided herein. If, however, DNR modifies the Permit other than as provided in Sections 2-5, any Party may challenge such modification to the extent permitted by law.

7. Any Party may seek a contested case hearing on a modification of the Permit undertaken pursuant to this Agreement, provided however, that in accordance with § NR 203.135(5)(b) Wis. Admin. Code a challenging Party may seek a hearing only on whether (i) DNR complied with the requirements of Sections 2-5 of this Agreement in modifying the Permit, or deciding not to modify the Permit and; (ii) DNR's determinations underlying modification of the Permit, or a decision not to modify the Permit, to implement Sections 2-5 of this Agreement, are reasonable and sufficiently grounded in fact, and not arbitrary and capricious.

...

12. Any modification of the Permit shall be carried out in accordance with procedures provided for at § 283.53 Wis. Stat. and §§ NR 203.135 & .136 Wis. Admin. Code.

Exh. C, ¶¶ 3, 6-7, 12.

51. In July 2021, the Wisconsin Supreme Court issued an opinion in the Kinnard Case, holding that DNR "had the explicit authority to impose . . . off-site groundwater monitoring conditions" in the WPDES permits. *See Clean Wisconsin v. DNR*, 2021 WI 71, ¶2, 398 Wis. 2d 386, 961 N.W.2d 346.

52. Between November 2021 and February 2022, Original Petitioners and Gordondale provided "input" to DNR pursuant to Paragraph 3 of the Initial Settlement Agreement.

53. On April 12, 2022, DNR issued a draft permit modification pursuant to the terms of the Initial Settlement Agreement (hereinafter the "Draft Monitoring Permit").

54. The Draft Monitoring Permit added multiple sections (Sections 2, 2.1.1, 3.7, 3.8, and 4.3) to Gordondale's WPDES permit.

55. Section 3.7 of the Draft Monitoring Permit outlined a multi-phase schedule for implementing landspreading field groundwater monitoring. Specifically, Section 3.7 required Gordondale to submit a plan for monitoring on at least one land application site where “tillage, cropping, and nutrient application practices” are typical for the CAFO.

56. The modified terms of the Draft Monitoring Permit were open to public comment. Nothing in the Initial Settlement Agreement limited DNR’s ability to consider and act on public comment.

57. Paragraph 12 of the Initial Settlement Agreement affirmatively required DNR to consider and act as appropriate on public comments.

58. DNR received approximately 75 comments on the proposed permit modifications.

59. In May 2022, Original Petitioners filed comments on the Draft Monitoring Permit supporting the proposed changes while also requesting revisions to ensure informative and representative groundwater monitoring data.

60. On August 12, 2022, DNR noticed a final determination on the Draft Monitoring Permit, issuing the WPDES Permit No. WI-0062359-03-1 to the CAFO (hereinafter “Monitoring Permit”). **A true and correct copy of the Notice of Final Determination for the Monitoring Permit is attached as Exhibit D. A true and correct copy of the Monitoring Permit is attached as Exhibit E.**

61. In issuing the Monitoring Permit, DNR made changes based on public comment received. Specifically, DNR adjusted the number of monthly samples taken during the first phase of monitoring (“Phase 1”) from 8 monthly samples to 12 monthly samples.

62. In September 2022, Gordondale filed a contested case hearing petition with DNR pursuant to Wis. Stat. § 283.63 and a petition for judicial review in Portage County Circuit Court

(Case No. 2022-CV-0268) challenging the issuance of the Monitoring Permit. **A true and correct copy of Gordondale's Contested Case Hearing Petition without exhibits is attached as Exhibit F.**

63. On September 15, 2022, DNR granted Gordondale's Contested Case Hearing Petition. **A true and correct copy of DNR's Contested Case Hearing Grant Letter is attached as Exhibit G.**

64. On September 26, 2022, the Portage County Circuit Court ordered a stay of judicial review pending Gordondale's contested case hearing.

65. DNR never transmitted Gordondale's contested case hearing petition to the division of hearings and appeals.

66. Between September 2022 and September 2023, DNR and Gordondale had private settlement negotiations that were focused on the groundwater monitoring terms of the Monitoring Permit.

67. The public, including Petitioners, was excluded from these settlement negotiations.

68. On September 11, 2023, the DNR/CAFO Agreement between DNR and Gordondale became effective. **A true and correct copy of the DNR/CAFO Agreement is attached as Exhibit H.**

69. Section 4 of the DNR/CAFO Agreement identifies sections of the Monitoring Permit that "shall be modified" by directly inserting specific provisions from the DNR/CAFO Agreement into the Draft Modified Permit.

70. The DNR/CAFO Agreement did not include a paragraph committing DNR to carry out the permit modification in accordance with procedures provided for in Wis. Stat. § 283.53 and Wis. Admin. Code §§ NR 203.135 & .136.

71. DNR did not retain any authority to consider and potentially incorporate public comments into a final permit.

72. DNR could only copy over the language identified in the DNR/CAFO Agreement into the Modified Permit.

73. Gordondale did not withdraw its contested case hearing petition following the execution of the DNR/CAFO Agreement.

74. Pursuant to the DNR/CAFO Agreement, DNR committed to never transmitting Gordondale's contested case hearing petition unless Gordondale requests transmission or there is a material breach of the DNR/CAFO Agreement. Exh. H, § 7.1.

75. The DNR/CAFO Agreement established preset permit terms to be included in a modified permit, WPDES Permit No. WI-0062359-03-2 (hereinafter the "Draft Remodified Permit"). **A true and correct copy of the Draft Remodified Permit is attached as Exhibit I.**

76. The modifications noticed in the Draft Remodified Permit are recitations of the agreed upon terms in Section 4 of the DNR/CAFO Agreement.

77. Pursuant to the DNR/CAFO Agreement, Section 2 of the Draft Remodified Permit was modified to reduce the frequency of monitoring for most contaminant parameters from monthly to quarterly. Additionally, all references to Phase 2 of the groundwater monitoring plan were removed from Section 2 of the Draft Remodified Permit.

78. Pursuant to the DNR/CAFO Agreement, Section 3.7 of the Draft Remodified Permit, which outlines the schedule for implementing landspreading field monitoring, was modified. Specifically, the Phase 1 description of Section 3.7 states:

Submit a groundwater monitoring plan consistent with the Groundwater Requirements section of the permit for the initial monitoring wells for Department review and approval. The plan shall outline the permittee's design for monitoring at the field designated as GORD-068 in Gordondale's Department approved Nutrient Management Plan. The Phase 1 plan shall propose installation of three (3) groundwater monitoring wells. The Phase 1 plan shall require Gordondale to fill and seal any monitoring well in accordance with the requirements of Chapter NR 141, Wis. Admin. Code, upon abandonment. The Phase 1 groundwater monitoring plan shall include procedures for scheduling quarterly or semi-annual sampling within four (4) weeks of the application of manure or process wastewater to the subject land application site when applicable.

79. Pursuant to the DNR/CAFO Agreement, the Draft Remodified Permit establishes a specific field where monitoring would occur and removes language requiring typical "tillage, cropping, and nutrient application practices" on the field where groundwater monitoring would occur.

80. The language in these modified sections was taken directly from the DNR/CAFO Agreement.

81. DNR issued the notice of the Draft Remodified Permit on September 28, 2023. The notice states: "The department and permittee reached a settlement agreement and is proposing to modify the [Monitoring Permit] to reflect the terms and conditions of the agreement."

82. The notice did not indicate that the terms of the DNR/CAFO Agreement left no discretion for DNR to amend the Draft Remodified Permit pending consideration of public comments.

83. Over 20 individuals petitioned DNR to hold a public informational hearing on the Draft Remodified Permit.

84. On November 6, 2023, DNR issued a notice that a public informational hearing on the Draft Remodified Permit would be held virtually on December 7, 2023. Again, this notice did not indicate that the terms of the DNR/CAFO Settlement were binding in a way that precluded any changes in response to public comments. **A true and correct copy of the Public Informational Hearing Notice is attached as Exhibit J.**

85. None of the issued public notices included a copy of the DNR/CAFO Agreement or portions of the settlement language that applied to the groundwater monitoring terms.

86. As a result, many participants at the December 7, 2023, hearing commented that DNR should not enter into the settlement agreement, believing it to be a prospective decision where their comments could still be considered.

87. However, the groundwater monitoring terms that were incorporated into the Draft Remodified Permit could not be amended in response to public participation during the required permit comment period.

GROUNDNS FOR RELIEF

88. The allegations in the foregoing paragraphs are realleged and incorporated herein by reference.

89. DNR may only issue a CAFO WPDES permit, in either the first instance or through modification, after DNR complies with the public participation requirements of Chapter 283 of the Wisconsin Statutes and regulations promulgated thereunder.

90. DNR made errors of law and abused its discretion when it entered into a settlement agreement that established permit terms. The pre-established permit terms were set before the Gordondale permit comment period.

91. DNR, therefore, could not meaningfully consider public comments, and/or modify permit terms in response to public comments, as is required by Wisconsin law.

92. DNR also made errors of law and abused its discretion by failing to transmit Gordondale's Contested Case Hearing Petition to the division of hearings and appeals and committing to never transmitting a pending petition.

93. DNR's failure to transmit the petition is an ongoing error of law because the Gordondale Contested Case Hearing Petition has not been withdrawn and will not be transmitted to the division of hearings and appeals.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request that the Court:

A. Declare that the decision to enter into the DNR/CAFO Agreement is invalid for failing to comply with Wisconsin Law;

B. Reverse, set aside, or vacate the DNR/CAFO Agreement pursuant to Wis. Stat. § 227.57;

C. Declare that DNR lacked discretion to choose not to transmit Gordondale's Contested Case Hearing Petition to the division of hearings and appeals;

D. Order DNR to transmit Gordondale's Contested Case Hearing Petition to the division of hearings and appeals;

E. Award costs and attorney fees pursuant to Wis. Stat. § 814.245; and

F. Such other relief as the Court may deem just and equitable.

Respectfully submitted this 23rd day of April, 2024.

Electronically Signed by Adam Voskuil



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